88-818

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JASPER J. MIRABILE, JR., et al,
Petitioners,

v.

RICHARD WRIGHT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS B. ALLEMAN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
(816) 842-3512
COUNSEL OF RECORD

JAMES M. YERETSKY
PATRICK J. DORAN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
(816) 842-3512
COUNSEL FOR PETITIONERS

November 14, 1988

QUESTIONS PRESENTED

I. DOES THE DISTRICT COURT'S JUDGMENT AWARDING PUNITIVE DAMAGES VIOLATE THE SEVENTH AMENDMENT AS AN ADDITUR WHERE THE JURY SPECIFICALLY FOUND THAT THE RESPONDENTS SUFFERED NO ACTUAL DAMAGE?

II. MUST THE DECISION BELOW THAT NO ACTUAL DAMAGES ARE NECESSARY TO SUPPORT PUNITIVE DAMAGE AWARDS BE CORRECTED TO PREVENT THE CONFUSION ALREADY RESULTING IN THE COURTS OF THE FORUM FROM THE FAILURE TO FOLLOW STARE DECISIS?

LIST OF PARTIES

The parties to the proceedings below were petitioners Jasper Mirabile, Jr., Leonard Mirabile and Sam Gianino, Jr. as defendants. Jasper's Italian Restaurant, Inc. was also a defendant at trial but verdicts were returned in its favor and plaintiffs did not appeal from judgments thereon.

Respondents James Wright, Larry E. Hout, Sr. and David Norman were plaintiffs at trial and appellees in the United States Court of Appeals for the Eighth Circuit.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

JASPER J. MIRABILE, JR.,
LEONARD MIRABILE, SAM GIANINO,
JR., Petitioners,

v.

RICHARD WRIGHT, LARRY E. HOUT, SR.,
DAVID NORMAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Jasper Mirabile, Jr., Leonard Mirabile and Sam Gianino, Jr. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the proceeding entitled James Wright, et al., vs. Jasper's Italian Restaurant, Inc., et al., on July 15, 1988.

OPINIONS BELOW

The Per Curiam opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the appendix hereto, p. 2a, infra.

The Memorandum and Order of the United States District Court for the Western District of Missouri (Sachs, J.) is reported at 672 F.Supp. 424, and is reprinted in the appendix hereto, p.11a, infra.

JURISDICTION

Invoking diversity of citizenship under 28 U.S.C. Section 1332, the respondents filed this action in the Western District of Missouri. On November 9, 1987, following a jury trial, the Western District denied petitioners' Motion for Judgment Notwithstanding the Verdict.

On petitioners' appeals, the Eighth Circuit on July 15, 1988 entered a Per Curiam judgment affirming the Western District's Memorandum and Order. The petitioners' Petition for Rehearing was denied by the Eighth Circuit on August 15, 1988.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the

District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

On July 10, 1986, respondents were conducting repairs on underground water lines on the public street in front of Jasper's Italian Restaurant in Kansas City, Missouri. As part of their work, respondents Hout and Norman had blocked lanes of traffic. Petitioner Jasper Mirabile, Jr. drove his car onto the street from the restaurant parking lot, accidentally knocking over a safety barrier which had been erected by respondents. Respondent Hout shouted

obscenities at Jasper Mirabile and kicked his car. (Tr., pp. 282, 735, 740, 870). An argument ensued, eventually involving respondents, petitioners and respondents' trial attorney, Larry E. Kinnamon. (Tr., pp. 331, 350).

Police officers arrived on the scene and all parties before this Court were arrested and taken to police headquarters. (Tr., pp. 454-56, 638). All charges were subsequently dismissed. (Tr., pp. 384, 624, 881).

Admittedly, respondents Hout and Norman presented evidence they were physically touched by petitioners or some of petitioners. Nevertheless, respondents make no claims that they suffered any physical injuries. (Tr., pp. 357, 623-24, 880-81). None of respondents incurred any medical bills. (Tr., pp. 382-83, 623-24). Respondents

were not treated by any physicians, psychologists or psychiatrists as a result of the events of July 10, 1986. (Tr., pp. 357, 384, 623-24, 880-81).

The case was submitted to the jury on 23 separate allegations of assault and false imprisonment against petitioners and Jasper's Italian Restaurant, Inc., an additional defendant at trial. Respondents did not argue for nominal damages to be awarded. Instead, counsel for respondents requested that the jury award each respondent $50,000.00 actual damages on each claim for assault and for false imprisonment and $200,000.00 punitive damages on each claim. (Tr., p. 1042).

The court's written instruction on punitive damages told the jury that if it found the issues in favor of one or more of the respondents and if the jury

further believed that the conduct of the petitioners rose to the requisite level, then "in addition to any damages which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount of punitive damages." Appendix, p.22a, infra, emphasis added. Counsel for respondents did not request an instruction on nominal damages, instead stating at the instruction conference that, "I think the instructions as modified would be all that should be offered to the jury." (Tr., p. 990).

All verdicts involving defendant Jasper's Italian Restaurant, Inc. were in favor of that defendant. No actual damages were assessed by the jury against petitioners. The jury returned verdicts for respondent Wright for $5,000.00 punitive damages for false

imprisonment. The jury awarded respondent Hout $22,500.00 in punitive damages for assault. The jury found for respondent Norman on his assault claims, awarding $27,500.00 in punitive damages. Appendix, pp. 20a-21a, infra.

After the jury's verdicts were read in open court, counsel for respondents did not request that the jury be instructed for further deliberations or that the verdicts be modified in any way before the jury was discharged. (Tr., pp. 1063-64).

The court entered judgment on the verdicts in their form as returned by the jury, stating on the face of the judgment that

> The above dollar amount are derived from the jury verdicts for punitive damages. No actual damages were awarded.

Appendix, p.21a, infra.

Petitioners then filed their Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, or in the Alternative for Remittitur. The trial court denied these motions in their entirety in the Memorandum and Order dated November 9, 1987. See Appendix, p.11a, et seq., infra.

Three aspects of the memorandum decision denying petitioners' post-trial motions require emphasis:

a. The trial court rejected petitioners' position that nominal damages cannot be assessed by a court absent some prior assessment by the jury. The court stated it was aware of no rule of federal or state procedure so dictating, instead finding that it could have made a judgment entry of nominal damages based on the verdicts in favor of respondents. See Appendix, p.17a, infra.

b. The trial court rejected authority cited by petitioners wherein an intermediate appellate court in the forum

reversed the trial court's denial of a motion for judgment notwithstanding the verdict. At trial, the jury in that case had awarded plaintiffs zero in actual damages and $10,000 in punitive damages. Melville v. Cheryl Scott Real Estate Co., 664 S.W.2d 529 (Mo.App. 1983). The court read the case as a "procedural miscarriage" and further found that in "direct injury" torts the wrong is committed regardless of pecuniary loss. See Appendix, p.15a-16a, infra.

c. The trial court reasoned that the Melville decision was a ruling by an intermediate appellate court in Missouri which had not accepted or considered a subsequent decision by the Missouri Supreme Court, Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. 1981), wherein the appellate court vacated an award of actual damages where the evidence did not support such an award and entered an award of nominal damages to support punitive damages found by the jury. Appendix, p.19a, infra.

In due course, the petitioners took appeals to the Eighth Circuit from the district court's memorandum decision. Prior to oral argument before the

appellate panel, the decision in O'Brien v. Mobil Oil Corp., 749 S.W.2d 457 (Mo.App. 1988) was handed down. Since that decision was not final at the time of oral argument, the petitioners' first opportunity to address that decision was in their Petition for Rehearing, following the panel's Per Curiam decision dated July 15, 1988.

In that Per Curiam decision, the Eighth Circuit discussed at length the concurring opinion in the O'Brien decision. Judge Satz's concurrence drew heavily from the district court's memorandum opinion, which had since been published in the Federal Supplement. The Per Curiam opinion stated

> Judge Satz's concurrence indicates that, at a minimum, Missouri law on this question does appear to be subject to varying interpretations. The district court considered appellants' arguments in its Memorandum and Order denying their motions for judgment notwithstanding

> the verdict applying an analysis similar to the analysis in Chief Judge Satz's concurring opinion.

Appendix, p.7a, infra.

The Eighth Circuit refused to reverse the district court since it did not find the lower court's interpretation of state law "fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion." Appendix, p.9a, infra.

REASONS FOR GRANTING THE WRIT

I. The District Court's Judgment Awarding Punitive Damages Violates the Seventh Amendment As an Additur Because the Jury Specifically Found Plaintiffs Suffered No Actual Damage.

Without case law or precedent to support its result, the district court chose to deny the Petitioners their right to trial by jury by entering judgment against them for punitive damages,

despite the fact the jury found plaintiffs suffered no actual damage. In so doing, the Court below impermissibly imposed damages beyond those found by the jury. This result destroys the distinction between civil liability and criminal prosecution and disturbs the order of the law.

The lower courts had ample opportunity to rectify the contradictory verdicts returned by the jury. Incredibly, the district court chose instead to enter judgment for plaintiffs in the amount of $55,000 on punitive damages alone. Appendix, p.20a-21a, infra. Not only does the result directly conflict with case law of the forum on the relationship of actual to punitive damages, see Melville v. Cheryl Scott Real Estate Co., 664 S.W.2d 529 (Mo.App. 1983), the judgment also

unconstitutionally deprives the Petitioners of their right to a jury trial. Such a drastic departure from settled law deserves this Court's attention.

Over 50 years ago, this Court recognized that imposition by the judiciary of damages in addition to those to be awarded by a jury violates the right to a jury trial. In Dimick v. Shiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), this Court held that damages imposed by a court beyond the jury's finding violates important policy considerations. The unconstitutionality of additur prevents judges from usurping the traditional role of members of the community in resolving issues of fact. These same principles apply no less in this case.

In the trial of this matter, the jury did in fact resolve factual issues in favor of the Petitioners in finding that the plaintiffs suffered no actual damage. But the district court gave no consideration to the fact that an additur is unconstitutional. Incredibly, the trial judge held that "judges can independently direct the entry of nominal damage judgments." See Memorandum and Order, p.17a-18a, infra. Such a radical departure from settled principles of law has been accepted only in two unrelated areas.[1] The district court's bald

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[1]In the area of civil rights litigation, this Court has recognized that a finding for the civil rights plaintiff is, in itself, a significant interest which would allow courts to enter nominal damages even where no actual damages were found by the jury. Carey v. Piphus, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978). No such important constitutional considerations are present in this common law tort area to warrant a departure from CONT

attempt to create a new exception to the rule of law must be rejected by this Court to prevent the likely confusion to follow.

Appellate courts have vacated actual damage awards where the evidence does not support such an award and have judicially entered nominal damages. See, e.g., Jasperson v. Purolator Courier Corp., 765 F.2d 736 (8th Cir. 1985). Petitioners do not deny that if the jury in the trial of this case had returned an award of actual damages, the courts could have vacated that finding as contrary to the evidence and entered a nominal damage award to support the punitive damages. However, the Court is faced with an entirely different situation. With no actual damages found by the jury, the punitive

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the general rule precluding judges from adding to damages found by the jury.

damages, standing alone, must fall: they are unsupported by any actual damages - either compensatory or nominal - and an entry of a nominal award to support the punitive damages constitutes an additur. See O'Hagan v. Soto, 565 F.Supp. 422 (S.D.N.Y. 1983). Similarly, a judgment entered for punitive damages alone not only directly conflicts with settled law of the forum, but also conflicts with the jury's finding of no actual damages, which is in fact a verdict for Petitioners under the law of the forum. Sullivan KSD/KSD-TV, 661 S.W. 2d 49 (Mo.App. 1983). The judgment below thus violates Petitioners' right to a jury trial. The proper development of law requires that this Court correct this grievous error.

II. The Decision Below That No Actual Damages Are Necessary To Support Punitive Damage Awards Must Be Corrected To Prevent Confusion Already Resulting In The Courts Of The Forum From The Failure To Follow Stare Decisis.

The Eighth Circuit here has sanctioned such a radical departure from the usual course of judicial proceedings to warrant the exercise of this Court's full power to prevent further havoc in the law of the forum. The district court's published opinion, in disregarding the rule of stare decisis, has already led one appellate judge in the forum to question previously settled case law on the relationship between actual and punitive damages. See O'Brien v. Mobil Oil Corp., 749 S.W.2d 457, 459 (Satz, C.J., concurring).

The Eighth Circuit merely compounded the damage in its Per Curiam opinion by applying circuitous logic: the Court of

Appeals relied on the analysis of Judge Satz's concurring opinion in the O'Brien opinion, supra, which in turn followed the analysis of the district court, to find that the district court's analysis was sound. Any conclusion based on such defective reasoning can hardly be considered a legitimate basis for dismantling decades of uncontroverted law of the forum.

The case law of Missouri is unanimous: there can be no recovery for punitive damages without a finding by the jury of actual damages. Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968). The decision in Melville v. Cheryl Scott Real Estate Co., supra, explicitly follows this position. The district court, however, rejected the role of federal courts sitting in diversity by refusing to ascertain and apply the law of the

forum on the relationship between actual and punitive damages. See Hazen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985). Instead, the judgment stated specifically that the $55,000 damages were punitive damages only. Since the premise of the trial judge's Memorandum and Order is inherently unsound, the Eighth Circuit failed in its duty to reverse the District Court. Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988). This Court should intervene to correct this error.

In the absence of conflicting decisions of the state's highest court, federal courts sitting in diversity are governed by the holdings of intermediate state courts on matters of state law. Gooding v. Wilson, 405 U.S. 518, 526, 92 S.Ct. 1103, 1107-08, 31 L.Ed.2d 408 (1972). Here, the district court refused

to follow decisions of the intermediate appellate courts of the forum. In its Memorandum and Order, the district court opined that the Missouri Court of Appeals in Melville, supra, did not state the law of the forum, and the trial judge concluded he was not bound by Melville for the reason that decision did not follow previous rulings of the Missouri Supreme Court[2].

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[2]The Memorandum and Order stated in pertinent part:

> It is possible that one or more intermediate appellate decisions in Missouri have been ruled after Herberholt wihtout accepting or considering the lesson of Herberholt. Defendants' reading of Melville would be an example of such a ruling.

Herberholt v. dePaul Comm. Health Center, 625 S.W.2d 617 (Mo.banc 1981) addressed the ability of appellate courts to vacate an actual damage verdict where the evidence did not support such damages and to enter nominal damages in its place to support punitive damages. Here, of course, there were no actual damages found by the jury for the court to vacate, so the entry of nominal damages would constitute an additur. See Section CONT

The district court failed to examine the appellate history of the Melville decision. Following the ruling of the Court of Appeals, the cause was then transferred to the Missouri Supreme Court, which retransferred the case to the Court of Appeals four months later without a written opinion. If the decision in Melville did not state the law of the forum, the Supreme Court had ample opportunity to say so, but declined to while it had jurisdiction over the case. The district court's conclusion that it was not bound by the law of the forum as set forth in Melivlle is simply not supported by the course of that case's proceedings on appeal.

The district court struggled further to distinguish Melville and explain away the law of the forum that nominal damages

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I, supra.

cannot be implied by courts. Armstrong v. Republic Realty Mfg. Corp., 631 F.2d 1344, 1351 (8th Cir. 1980). The case cited in the Memorandum and Order to support the proposition that this rule does not apply to "direct injury" torts did not even concern such a tort. See Stephenson v. Stephenson, 618 S.W.2d 715 (Mo.App. 1981). Federal courts cannot, as the district court elected to, sustain damages awarded in excess of those which could be sustained were the case before the courts of the forum. Ferren v. Richards Mfg. Co., 733 F.2d 526, 531 (8th Cir. 1984). Significantly, the respondents chose not to submit the issue of nominal damages to the jury either by written jury instruction (Tr., p. 990), or in closing argument. (Tr., pp. 1031-43; 1053-61). The district court's conclusion that nominal damages are

"implied" by a plaintiff's verdict in direct injury torts is unsupported by case law of the forum. A plaintiff's failure to submit on nominal damages precludes recovery where the jury finds no actual damages were suffered. Sullivan v. KSD/KSD-TV, 661 S.W.2d 49 (Mo.App. 1983). The federal courts follow this rule on the effect of failing to submit a theory of recovery to the jury. Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984). The trial judge clearly reached the wrong result for the wrong reason.

Before the district court's opinion, there existed certainty and predictability in the forum on the relationship between actual and punitive damages. Since that decision, Missouri courts must unneccessarily struggle with these issues. Indeed, Judge Satz's

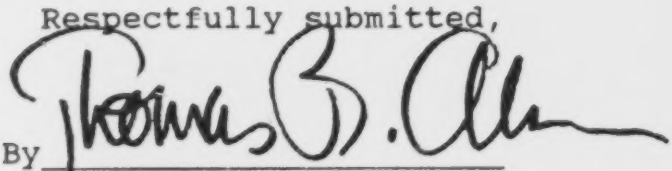
concurring opinion in the O'Brien decision after examining the district court's holding, notes "I look forward to clear sailing in calmer weather on the Sea of Black Letter Law." 749 S.W.2d at 461. Rather than sanction the lower courts' rejection of settled law, this Court should steer the courts back on course in accordance with the law of the forum.

CONCLUSION

The petitioners have raised important questions which, if left unresolved, will result in further confusion in the forum. This petition for certiorari should therefore be granted for plenary review of the judgment below. Alternatively, this Court should summarily reverse the decision of the Eighth Circuit, or grant

certiorari, vacate the judgment below, and remand the case for reconsideration. The courts and litigants in Missouri deserve no less.

Respectfully submitted,



By _____

THOMAS B. ALLEMAN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
(816) 842-3512
COUNSEL OF RECORD

JAMES M. YERETSKY
PATRICK J. DORAN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
(816) 842-3512

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2645WM

James Wright, et al., *
*
Appellees, *
*
vs. *
*
Jasper's Italian Restaurant, Inc., et al. *
*
Appellants. *

Appeal from the United States District Court for the Western District of Missouri.

Appellants' petition for rehearing has been considered by the Court and is denied.

August 15, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Wright, Larry E. Hout, Sr., David Norman,	*
Appellees,	*
vs.	*
Jasper's Italian Restaurant, Inc., Jasper Mirabile, Jr.., Leonard Mirabile, Sam Gianino, Jr.,	*
Appellants.	*

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1988

Filed: July 15, 1988

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, and HENLEY, Senior Circuit Judges.

PER CURIAM

Appellants, Jasper Mirabile, Jr., Leonard Mirabile, and Sam Gianino, Jr., appeal the judgment of the district

court[1] entered on a jury verdict awarding appellees James Wright, Larry E. Hout, Sr., and David Norman a total of $55,000 in punitive damages.

On July 10, 1986 the appellees were making repairs on the water lines in front of Jasper's Italian Restaurant, Inc. (restaurant). Jasper Mirabile drove his vehicle out of the Jasper's parking lot and in the process he knocked over a safety barrier placed in the street by the appellees. The subsequent events are disputed by the parties, but taking the facts in the light most favorable to the appellees, the verdict winners, it appears that profanity was exchanged between Hout and Jasper Mirabile. Jasper

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[1]The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri. The district court's opinion is published at 672 F.Supp. 424 (W.D. Mo. 1987).

then returned to the restaurant parking lot and continued the verbal exchange with Hout. Jasper later left and went into the restaurant returning with Leonard Mirabile and Sam Gianino. The altercation escalated and all of the parties to this appeal were arrested by the Kansas City Police Department. All charges were later dismissed.

Appellees filed this diversity action in the district court seeking recovery on four separate tort theories: 1) assault; 2) false arrest; 3) false imprisonment; and 4) the tort of outrage. After a four day trial the court submitted the case to the jury on the first three theories. The jury returned a verdict for the appellees in the aggregate amount of $55,000. The jury did not award the appellees any actual damages, but based its entire

award on punitive damages. The only issue on appeal is whether the district court erred in entering judgment on the verdict and awarding appellees $55,000 in punitive damages notwithstanding the jury's award of $0 in actual damages. Appellants argue that under Missouri law an award of actual damages, even if only a nominal award, is a prerequisite to a punitive damages award.

Many Missouri cases give lip service to the categorical statement that there can be no punitive damages without an award of actual damages. See, e.g., O'Brien v. Mobile Oil Corp., 749 S.W.2d 457, 458 (Mo. Ct. App. 1988). However, as noted by Chief Judge Satz in O'Brien there is difficulty in Missouri as in other jurisdictions concerning the meaning of the work "damages". Id. at 459 (Satz, C.J., concurring). His

statement in discussing Missouri law may be summarized as follows: In cases involving torts where actual damages are an element of the tort, actual damage recovery is a prerequisite to an award of punitive damages. This is merely a short way of saying that if the plaintiff does not get an award of actual damages he has not proven his case and thus is not entitled to punitive damages. However, when the tort asserted by the plaintiff does not require a showing of actual damage as an element of the tort, e.g., false imprisonment, then there is no reason to deny an award of punitive damages when the jury has determined that there is no actual damage, but returns a verdict in the plaintiff's favor and awards punitive damages. Simply because the jury did not award actual damages does not mean that the plaintiff has

failed to prove the elements of the tort, because actual damage is not an element of direct injury tort where a wrong has been committed notwithstanding the absence of pecuniary loss. Chief Judge Satz concurred in the O'Brien decision denying the plaintiff punitive damages because in that case the plaintiff's procedural default waived the right to a correction of the verdict. Judge Staz's concurrence indicates that, at a minimum, Missouri law on this question does appear to be subject to varying interpretations. The district court considered appellants' arguments in its Memorandum and Order denying their motions for judgment notwithstanding the verdict applying an analysis similar to the analysis in Chief Judge Satz's concurring opinion.

When reviewing diversity cases involving questions of state law this court has repeatedly held that substantial deference is given to the district court's interpretation of satte law in the state in which its sits. Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988). The only issue involved in this case is purely a question of Missouri law. Further, the question involves tort law which is generally state specific and quite often difficult to discern. It is in such circumstances that the rule giving deference to the district court's interpretation of the law of the state in which it sits has the greatest validity. The rule is founded on prudential concerns and the recognition that many time the district court is in a better position to interpret the law of

the state in which it sits than is the court. See Cullum v. Mutual of Omaha Ins. Co., 840 F.2d 619, 621 (8th Cir. 1988) (rule of deference applies especially when the state law is not clear).

A district court's interpretation of state law will only be overturned by this court if we find its interpretation "'fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion." McCarthy Bros. Const. Co. v. Pierce, 832 F.2d 463, 467 (8th Cir. 1987) (quoting Economy Fire & Casualty Co. v. Tri-State Ins. Co., 827 F.2d 373, 375 (8th Cir. 1987)). We cannot say that the district court's decision is deficient in any of the above respects. In fact the district court's careful analysis has noted a subtle distinction in Missouri law that

distinguishes the circumstances when an award of punitive damages may be proper notwithstanding the absence of an actual damages award. Accordingly we affirm on the basis of the district court's well reasoned opinion.

See 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al.)
)
Plaintiffs,)
)
vs.)
)
JASPER'S ITALIAN RESTAURANT, INC., et al.,)
)
Defendants.)

No. 86-0881-CV-W-6

MEMORANDUM AND ORDER

Three nonresident construction workers engaged in water main work in the street outside Jasper's Restaurant in the Waldo area of Kansas City have recovered various sums in punitive damages for assault and false imprisonment. Defendants are the manager and another restaurant employee as well as Jasper Mirabile, Jr., son of the founder of the restaurant. The recoveries, totaling $55,000, range from a high figure of $15,000 assessed in favor of David Norman

against Jasper Mirabile, Jr., for assault to a low figure of $2,500 assessed in favor of both David Norman and Larry Hout against Sam Gianino, Jr. for assault. The false imprisonment recovery was in favor of James Wright against Jasper Mirabile, Jr., in the amount of $5,000. The major problem presented by defendants' post-trial motions is that the jury assessed no sum for "actual damages" but only for punitive damages.

Having heard the evidence it seems clear to me that the jury was authorized to find that outrageous conduct had occurred on the afternoon in question and that there were events constituting assaults and at least one instance of false imprisonment. The jury gave this case fair and measured consideration. Some of the verdicts on plaintiffs' claims were in favor of the individual

defendants as well as the corporate defendant. While the recoveries are considerably in excess of any fines likely to be imposed in comparable criminal prosecutions they probably cannot be considered so grossly excessive, under punitive damage standards, as to authorize post-trial relief.

The absence of "actual damage" recoveries does not signify that no physical or mental harm was done, but simply the apparent difficulty of putting a dollar value on the harm to plaintiffs. The verdict forms contain a finding filled out by the jury in favor of each plaintiff against the defendant in question for either assault or false imprisonment, and then contain the figure "0" as the amount of actual damages and the pertinent figures mentioned as

punitive damages. Neither party requested and the court did not give an instruction on nominal damages, as might have been desirable.

Missouri substantive law is applicable. Defendants seek entry of judgments in their favor, notwithstanding the verdicts, and cite a recent intermediate appellate court decision which they assert is squarely in their favor. Melville v. Cheryl Scott Real Estate Company, 664 S.W.2d 529 (mo. App. 1983). The trial judge in that case rejected a post-trial motion for relief from a judgment based on a verdict in which the "jury awarded plaintiffs zero in actual damages and $10,000 in punitive damages." Stating that "nominal damages cannot be implied by us," the appellate court reversed the judgment on the theory that "Missouri follows the general rule

there can be no punitive damages without an award of actual damages."

The Melville case can easily be read as a procedural miscarriage in which plaintiff lst at $10,000 judgment because the jury neglected to award $1 nominal damages. The case is more sensibly explained, however, by a decision cited therein (Stevenson v. Stevenson, 618 S.W.2d 715, 719, (Mo. App. 1981)) in which an old rule was followed that "'deceit belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action.'" This is "'in contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damages.'" Thus, in Melville as in Stevenson no punitive damages were allowable because plaintiff had simply

lost the case when there was a failure to establish pecuniary loss. In the present case, however, we are surely dealing with "direct injury" torts like trespass, where the wrong is committed regardless of pecuniary loss.

The Missouri Supreme Court determined in 1981 that a punitive damage award of $50,000 could be sustained for violation of the employee service letter statute, even though there was a failure of proof as to actual damages. The appellate court simply set aside the actual damage judgment and directed that $1 be entered as nominal damages. Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. banc 1981). See also Rusk Farms, Inc. v. Ralston Purina Co., 689 S.W.2d 671, 681 (Mo. App. 1985). The Eighth Circuit has similarly directed judicial entry of nominal

damages when an award of actual damages cannot be sustained. Jasperson v. Purolator Courier Corp., 765 F.2d 736, 742 (8th Cir. 1985). Apparently I could have made such a judgment entry, based on verdicts in favor of plaintiffs.

Defendants contend, however, that nominal damages cannot be assessed by a court absent some prior assessment by the jury, such as occurred in the erroneous verdicts in Herberholt, Rusk Farms and Jasperson. I am aware of no rule of federal or state procedure so dictating, and defendants' theory that the courts gave some limited effect to the mistaken actual damage assessments by juries in the cited cases seems inherently unsound. On the contrary, I believe the cases stand for the proposition that, under appropriate circumstances, judges can independently direct the entry of

nominal damage judgments. A "legal implication" of damages arises "whenever a legal right of plaintiff is violated." Rusk Farm, supra.

If there was a significant procedural defect in this case it was in the failure of the court to enter judgment for nominal damages on the jury's verdict. I cannot believe that any such a procedural defect, which saved defendants a total of $7, is a matter that is incurable, prejudicial to defendants, or would offer grounds for causing plaintiffs to lose a judgment of $55,000. While I am of course bound by Missouri substantive law as expressed by the Missouri Supreme Court, I am satisfied that after Herberholt (where, even more clearly than in this case, there was a failure to proof as to actual

damages) the plaintiffs are entitled to retain their punitive damage recoveries.*

The motions for judgment notwithstanding the verdict are DENIED.

/s/Howard F. Sachs
HOWARD F. SACHS
UNITED STATES
DISTRICT JUDGE

DATED: Nov. 9, 1987.

---

*It is possible that one or more intermediate appellate decisions in Missouri have been ruled after herberholt. without accepting or considering the lesson of Herberholt. Defendants' required, however, to follow my understanding of Missouri law as gleaned from controlling opinions of the Missouri Supreme Court. R.W. Murry Co. v. Shatterproof Glass Co., 697 F.2d 818, 826-9 (8th Cir. 1983).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al.	)
	)
Plaintiffs,	)
	)
vs.	)
	)
JASPER'S ITALIAN RESTAURANT, INC., et al.,	)
	)
Defendants.	)

No. 86-0881-CV-W-6

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED

*That plaintiff James Wright recover $5,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Jasper Mirabile, Jr.; that plaintiff David Norman recover $15,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Leonard Mirabile; that plaintiff David Norman recover $10,000

against defendant Leonard Mirabile; that plaintiff Larry Hout recover $2,500 against defendant Sam Gianino, Jr.; that plaintiff David Norman recover $2,500 against defendant Sam Gianino, Jr.,; and that judgment be entered in favor of defendants except as herein specified.

---

*The above dollar amounts are derived from the jury verdicts for punitive damages. No actual damages were awarded.

Entered on 10-2-87

Clerk R. F. Connor Date 10-2-87

(By) Deputy Clerk Rita Riley
/s/ Rita Riley

INSTRUCTION NO. 26

If you find the issues in favor of one or more of the plaintiffs as submitted in these instructions and if you believe the conduct of one or more of the defendants towards such plaintiff as submitted in these instructions was willful, wanton, or malicious, then in addition to any damages to which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount as punitive damages against such defendant in such sum as you believe will serve to punish such defendant and to deter him and others from like conduct.

If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.

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Corrected

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No. 88-818

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JASPER MIRABILE, JR. et. al.
Petitioners,

v.

JAMES WRIGHT, et. al.
Respondents.

TO BE REPRINTED

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Clayton A. Chittim, Esq.
Suite 500, 1125 Grand Ave.
Kansas City, Missouri 64106
(816) 471-1060
RESPONDENTS' COUNSEL OF RECORD

Larry E. Kinnamon Jr., Esq.
P. O. Box 40393
Overland Park, Kansas 66204
(913) 642-0422
TRIAL COUNSEL FOR RESPONDENTS

St. Joseph, MO (P. Defender)

PETITION FOR WRIT
OF CERTIORARI DOCKETED
14th day of November, 1988

50 pp

BEST AVAILABLE COPY

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JASPER MIRABILE, JR. et. al.
Petitioners,

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PETITION FOR WRIT
OF CERTIORARI DOCKETED
14th day of November, 1988

SUPREME COURT OF THE UNITED STATES

No. _____

Jasper Mirabile Jr., et.al.

Petitioners,

vs.

James Wright, et.al.

Respondents.

The Clerk will enter my appearance as Counsel of Record for Respondents James Wright, Larry Hout, and David Norman who IN THIS COURT are respondents

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature

Name Clayton A. Chittim

Firm Attorney at law

Address Suite 500, 1125 Grand Ave.

City & State Kansas City, Missouri

Zip 64106

Phone (816) 471-1060

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UNITED STATES DISTRICT JUDGE
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RESPONDENTS' SUGGESTIONS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

The Petitioners are rehashing issues thoroughly briefed and argued before the three judge panel of the United States Court of Appeals for the Eighth Circuit June 13, 1988.

No new authority is advanced to this court that would warrant this court re-considering matters thoroughly evaluated and correctly decided by the erudite District Judge, the Honorable Howard Sachs of the Western District of Missouri. The Petitioners Jasper Mirabile Jr., Sam Gianino Jr., and Leonard Mirabile proffered an opening and reply brief in support of their contentions that the District Court should have granted their Motion For Judgment Notwithstanding the Verdicts. The respondents, James Wright, Larry Hout Sr., and David Norman thoroughly briefed the matters in support of the wise, legally correct, and provident ruling of the District Court denying the Motion For Judgment Notwithstanding the Verdicts entered November 9, 1987. (A copy of respondents' brief is attached hereto and incorporated herein for consideration by the court.)

The strange crux of Petitioners' argument is that the trial court somehow in some unexplained way violated the Seventh Amendment by entering verdicts in favor of respondents totalling $55,000.00 consistent with the jury verdicts returned consistent therewith. Petitioners are deeply troubled by the entry of judgment on the verdicts for punitive damages in the absence of actual damage assessments by the jury in this "direct injury" intentional torts lawsuit.

The Honorable Howard Sachs carefully analyzed and distinguished Petitioners' most earnestly argued authority, Melville vs. Cheryl Scott Real Estate Company 664 S. W. 2d 529 (Mo. App. 1983). The Melville, supra,case is not binding authority since it is significantly distinguishable. The dispositive factor in the case at bar is plainly and simply the nature of the torts involved, i.e. assault and false imprisonment which both are "direct injury" intentional torts,which by Missouri Law,have no element of actual injury or damage. If the finder of fact in a "direct injury" intentional tort lawsuit finds tort activity to have occurred vis-a-vis the tort plaintiff, then the tort plaintiff is entitled to recovery of nominal damages ($1.00) as a procedural matter even though no actual damage is alleged or proven. Melville, supra, involved a common law action in the nature of deceit,which in Missouri,requires,as an element of recovery,the proof of pecuniary loss. Thus, in fraud and deceit tort actions in Missouri,an essential element for the plaintiff to plead and prove is the element of pecuniary loss proximately caused by the commission of the tort. In the absence of such pleading and proof the entire claim for fraud and deceit fails. Melville, supra.; Stevenson vs. Stevenson 618 S. W.2d 715 (Mo. App. 1981). The Verdict Directing Instructions given properly to the jury in this case were carefully crafted based upon Missouri Approved Instructions adopted by the Missouri Supreme Court. No element is required of actual damage in assault or false imprisonmen claims in the state of Missouri. There is, in reality, little confusion in Missouri regarding this matter. There is only the feigned confusion of the counsel representing the Petitioners.

The jury found that the petitioners committed acts of assault and at least one act of false imprisonment. Thus, appropriately, verdicts were given in favor of all the respondents for punitive damages in a proper amount proportionate to the degree of egregious misconduct exemplified by the judgment defendants as solidly shown by the evidence adduced during the lengthy jury trial.

Missouri cases on the subject say that where an actionable wrong is done, even where no actual damages appear on inquiry, nevertheless, judicially, there is an "implication of damages" and nominal damages are given. Rusk Farms, Inc. vs. Ralston Purina Co. 689 S. W. 2d 671 (Mo. App. 1985); Wente vs. Shaver 169 S. W. 2d 947 (Mo. 1943). As correctly stated by the trial court in the Memorandum Opinion of November 9, 1987* when the jury returned the verdicts in favor of all plaintiffs-respondents, the District Court could properly have added $1.00 nominal damage to each verdict since the jury clearly rendered verdicts in favor of plaintiffs and against defendants,thus creating an "implication of damages"in the "direct injury" intentional tort claims. The trial court chose not to amend the verdicts in favor of all plaintiffs with $1.00 nominal damage on each verdict form. Such action by the trial court was unnecessary. No additur was even arguably given. The United States Court of Appeals for the Eighth Circuit could also properly have amended the Verdicts to provide $1.00 nominal damage on each verdict. See Jasperson vs. Purolator Courier Corp. 765 F. 2d 736 (8th Circ. 1985).

NOTE: This court should note that an important footnote appearing in the final page of Judge Sachs MEMORANDUM AND ORDER of November 9, 1987 was seriously misquoted in Petitioners' Petition For Writ of Certiorari p. 19a. The correct and true footnote appears at A-5 herein.

Whether the jury awards zero as actual damages, or, instead, the court awards $1.00 nominal damage, in either event, no matter of consequence has occurred. For petitioners to attempt to elevate the matter of nominal damage to an issue of importance and consequence to this Highest of Tribunals is utterly ludicrous.

What is important is that the jury determined after a lengthy trial that defendants-petitioners had perpetrated assaults and one case of false imprisonment which victimized the plaintiffs. The attentive jury determined that punishment was appropriate under the law, and therefore, assessed meaningful punitive damage awards. In Missouri, there is no nexus between actual damages and punitive damages. Under Missouri law there must be only a nexus between the wrong committed by the defendant and the amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. See Kerr vs. First Commodity Corp. of Boston 735 F. 2d 281 (8th Circ. 1984). Hence, the amount of actual damages awarded (even if none whatsoever) does not logically correlate with the propriety of a jury's allocation of punitive damages. The pivotal issue in the case at bar was simply whether the defendants committed wrongful acts which victimized the plaintiffs which said conduct was done intentionally, without just cause or excuse. The jury answered in the affirmative. Justice was done. The District Court, in the November 9, 1987 Memorandum Decision reflecting sound and rational reasoning, upheld the jury's verdicts. The Eighth Circuit, after being carefully briefed, and, after hearing oral arguments from both the Petitioners and Respondents, affirmed

the decision of the trial court, concluding, "..we affirm on the basis of the district court's well reasoned opinion."

There is no substantial basis for this court to now entertain the Petitioners' specious and whimsical arguments. Accordingly, the Petition For Writ of Certiorari should be DENIED.

Respectfully submitted,

Clayton A. Chittim
Suite 500, 1125 Grand Ave.
Kansas City, Mo. 64106
(816)471-1060

Larry E. Kinnamon Jr.
P. O. Box 40393
Overland Park, Kansas 66204
(913) 642-0422

Attorneys for respondents,
James Wright, Larry Hout Sr., and
David Norman

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

AMES WRIGHT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 86-0881-CV-W-6
	)	
ASPER'S ITALIAN RESTAURANT,	)	
NC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Three nonresident construction workers engaged in water main ork in the street outside Jasper's Restaurant in the Waldo area f Kansas City have recovered various sums in punitive damages or assault and false imprisonment. Defendants are the manager nd another restaurant employee as well as Jasper Mirabile, Jr., on of the founder of the restaurant. The recoveries, totaling 5,000, range from a high figure of $15,000 assessed in favor of avid Norman against Jasper Mirabile, Jr., for assault to a low igure of $2,500 assessed in favor of both David Norman and Larry out against Sam Gianino, Jr. for assault. The false imprisonent recovery was in favor of James Wright against Jasper irabile, Jr., in the amount of $5,000. The major problem preented by defendants' post-trial motions is that the jury ssessed no sum for "actual damages" but only for punitive amages.

Having heard the evidence it seems clear to me that the jury was authorized to find that outrageous conduct had occurred on the afternoon in question and that there were events constituting assaults and at least one instance of false imprisonment. The jury gave this case fair and measured consideration. Some of the verdicts on plaintiffs' claims were in favor of the individual defendants as well as the corporate defendant. While the recoveries are considerably in excess of any fines likely to be imposed in comparable criminal prosecutions they probably cannot be considered so grossly excessive, under punitive damage standards, as to authorize post-trial relief.

The absence of "actual damage" recoveries does not signify that no physical or mental harm was done, but simply the apparent difficulty of putting a dollar value on the harm to plaintiffs. The verdict forms contain a finding filled out by the jury in favor of each plaintiff against the defendant in question for either assault or false imprisonment, and then contain the figure "0" as the amount of actual damages and the pertinent figures mentioned as punitive damages. Neither party requested and the court did not give an instruction on nominal damages, as might have been desirable.

Missouri substantive law is applicable. Defendants seek entry of judgments in their favor, notwithstanding the verdicts, and cite a recent intermediate appellate court decision which they assert is squarely in their favor. Melville v. Cheryl Scott

Real Estate Company, 664 S.W.2d 529 (Mo. App. 1983.). The trial judge in that case rejected a post-trial motion for relief from a judgment based on a verdict in which the "jury awarded plaintiffs zero in actual damages and $10,000 in punitive damages." Stating that "nominal damages cannot be implied by us," the appellate court reversed the judgment on the theory that "Missouri follows the general rule there can be no punitive damages without an award of actual damages."

The Melville case can easily be read as a procedural miscarriage in which plaintiff lost a $10,000 judgment because the jury neglected to award $1 nominal damages. The case is more sensibly explained, however, by a decision cited therein (Stevenson v. Stevenson, 618 S.W.2d 715, 719 (Mo. App. 1981)) in which an old rule was followed that "'deceit belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action.'" This is "'in contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damages.'" Thus, in Melville as in Stevenson no punitive damages were allowable because plaintiff had simply lost the case when there was a failure to establish pecuniary loss. In the present case, however, we are surely dealing with "direct injury" torts like trespass, where the wrong is committed regardless of pecuniary loss.

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the employee service letter statute, even though there was a failure of proof as to actual damages. The appellate court simply set aside the actual damage judgment and directed that $1 be entered as nominal damages. Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. banc 1981). See also Rusk Farms, Inc. v. Ralston Purina Co., 689 S.W.2d 671, 681 (Mo. App. 1985). The Eighth Circuit has similarly directed judicial entry of nominal damages when an award of actual damages cannot be sustained. Jasperson v. Purolator Courier Corp., 765 F.2d 736, 742 (8th Cir. 1985). Apparently I could have made such a judgment entry, based on the verdicts in favor of plaintiffs.

Defendants contend, however, that nominal damages cannot be assessed by a court absent some prior assessment by the jury, such as occurred in the erroneous verdicts in Herberholt, Rusk Farms and Jasperson. I am aware of no rule of federal or state procedure so dictating, and defendants' theory that the courts gave some limited effect to the mistaken actual damage assessments by juries in the cited cases seems inherently unsound. On the contrary, I believe the cases stand for the proposition that, under appropriate circumstances, judges can independently direct the entry of nominal damage judgments. A "legal implication" of damages arises "whenever a legal right of plaintiff is violated." Rusk Farm, supra.

If there was a significant procedural defect in this case it was in the failure of the court to enter judgment for nominal

damages on the jury's verdict. I cannot believe that any such a procedural defect, which saved defendants a total of $7, is a matter that is incurable, prejudicial to defendants, or would offer grounds for causing plaintiffs to lose a judgment of $55,000. While I am of course bound by Missouri substantive law as expressed by the Missouri Supreme Court, I am satisfied that after Herberholt (where, even more clearly than in this case, there was a failure of proof as to actual damages) the plaintiffs are entitled to retain their punitive damage recoveries.*

The motions for judgment notwithstanding the verdict are DENIED.

Howard F. Sachs

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: Nov. 9, 1987.

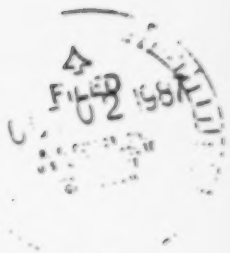
*It is possible that one or more intermediate appellate decisions in Missouri have been ruled after Herberholt without accepting or considering the lesson of Herberholt. Defendants' reading of Melville would be an example of such a ruling. I am required, however, to follow my understanding of Missouri law as gleaned from controlling opinions of the Missouri Supreme Court. R.W. Murray Co. v. Shatterproof Glass Co., 697 F.2d 818, 826-9 (8th Cir. 1983).

INSTRUCTION NO. 26

If you find the issues in favor of one or more of the plaintiffs as submitted in these instructions and if you believe the conduct of one or more of the defendants towards such plaintiff as submitted in these instructions was willful, wanton, or malicious, then in addition to any damages to which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount as punitive damages against such defendant in such sum as you believe will serve to punish such defendant and to deter him and others from like conduct.

If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



JAMES WRIGHT, et al.)
)
Plaintiffs,)
)
vs.) Case No. 86-0881-CV-W-6
)
JASPER'S ITALIAN RESTAURANT, INC., et al.)
)
Defendants.)

Verdict A

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff James Wright for false imprisonment against defendant Jasper Mirabile, Jr., unanimously find in favor of:

James Wright or _____
James Wright Jasper Mirabile, Jr.

Note: Complete the following paragraph only if the above finding is in favor of plaintiff James Wright.

We, the jury, assess the damages of plaintiff James Wright as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 5000.00 (stating the amount).

10-2-87 Terry L. Goodman
DATE FOREPERSON

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

OCT 02 1987

JAMES WRIGHT, et al. Plaintiffs, vs. JASPER'S ITALIAN RESTAURANT, INC., et al. Defendants.	)	Case No. 86-0881-CV-W-6

Verdict B

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff Larry Hout for assault against defendant Jasper Mirabile, Jr., unanimously find in favor of:

Larry Hout _____ or _____ Jasper Mirabile, Jr.
Larry Hout

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Larry Hout.

We, the jury, assess the damages of plaintiff Larry Hout as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 10,000. (stating the amount).

10-2-87 _____
DATE FOREPERSON

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

OCT 02 1987

JAMES WRIGHT, et al.

Plaintiffs,

vs.

JASPER'S ITALIAN RESTAURANT, INC., et al.

Defendants.

Case No. 86-0881-CV-W-6

Verdict C

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff Larry Hout for assault against defendant Sam Gianino, Jr., unanimously find in favor of:

Larry Hout _____ or _____ Sam Gianino, Jr.

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Larry Hout.

We, the jury, assess the damages of plaintiff Larry Hout as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 2500.00 (stating the amount).

10-2-87
DATE

Terry Graham
FOREPERSON

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al. Plaintiffs, vs. JASPER'S ITALIAN RESTAURANT, INC., et al. Defendants.	)	Case No. 86-0881-CV-W-6

Verdict D

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff Larry Hout for assault against defendant Leonard Mirabile, unanimously find in favor of:

Larry Hurt
Larry Hout

or

Leonard Mirabile

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Larry Hout.

We, the jury, assess the damages of plaintiff Larry Hout as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 10,000.00 (stating the amount).

10-2-87
DATE

Terry Gorham
FOREPERSON

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FILED
OCT 02

JAMES WRIGHT, et al.

Plaintiffs,

vs.

Case No. 86-0881-CV-W-6

JASPER'S ITALIAN RESTAURANT, INC., et al.

Defendants.

Verdict H

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff David Norman for assault against defendant Jasper Mirabile, Jr., unanimously find in favor of:

David Norman
David Norman

or

Jasper Mirabile, Jr.

Note: Complete the following paragraph only if the above finding is in favor of plaintiff David Norman.

We, the jury, assess the damages of plaintiff David Norman as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 15,000.00 (stating the amount).

10-2-87
DATE

Tim Gochan
FOREPERSON

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al. Plaintiffs, vs. JASPER'S ITALIAN RESTAURANT, INC., et al. Defendants.	)	Case No. 86-0881-CV-W-6

Verdict I

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff David Norman for assault against defendant Sam Gianino, Jr. unanimously find in favor of:

David Norman or _____ Sam Gianino, Jr.

Note: Complete the following paragraph only if the above finding is in favor of plaintiff David Norman.

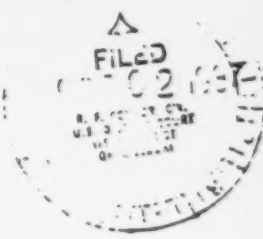
We, the jury, assess the damages of plaintiff David Norman as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 2,500.00 (stating the amount).

10-2-87
DATE

FOREPERSON



IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
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JAMES WRIGHT, et al.	)	
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Plaintiffs,	)	
	)	
vs.	)	Case No. 86-0881-CV-W-6
	)	
JASPER'S ITALIAN RESTAURANT, INC., et al.	)	
	)	
	)	
Defendants.	)	

Verdict J

We, the jury, duly empaneled and sworn, upon our oaths, on the claim of plaintiff David Norman for assault against defendant Leonard Mirabile, unanimously find in favor of:

David Norman or _____
David Norman Leonard Mirabile

Note: Complete the following paragraph only if the above finding is in favor of plaintiff David Norman.

We, the jury, assess the damages of plaintiff David Norman as follows:

For actual damages $ 0 (stating the amount).

For punitive damages $ 10,000.00 (stating the amount).

10-2-87
DATE

Terry Graham
FOREPERSON

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT WESTERN DISTRICT OF MISSOURI
CASE TITLE James Wright V. Jaspers Italian Restaurant, Inc., et al	DOCKET NUMBER 86-0881-CV-W-6 NAME OF JUDGE OR MAGISTRATE Howard F. Sachs

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

*That plaintiff James Wright recover $5,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Jasper Mirabile, Jr.; that plaintiff David Norman recover $15,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Leonard Mirabile; that plaintiff David Norman recover $10,000 against defendant Leonard Mirabile; that plaintiff Larry Hout recover $2,500 against defendant Sam Gianino, Jr.; that plaintiff David Norman recover $2,500 against defendant Sam Gianino, Jr.; and that judgment be entered in favor of defendants except as herein specified.

FILED
OCT 2 19
R. F. CONNOR, CLK.
U. S. DISTRICT COURT
WEST. DISTRICT OF MISSOURI

*The above dollar amounts are derived from the jury verdicts for punitive damages. No actual damages were awarded.

Entered On 10-2-87

CLERK	DATE
R. F. Connor	
(BY) DEPUTY CLERK Rita Riley Rita Riley	10-2-87

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2645WM

JAMES WRIGHT, LARRY E. HOUT, SR, DAVID NORMAN
PLAINTIFFS-APPELLEES

vs.

JASPER'S ITALIAN RESTAURANT, INC., JASPER MIRABILE,JR.
LEONARD MIRABILE, SAM GIANINO, JR.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BRIEF OF APPELLEES

Larry E. Kinnamon, Jr.
6929 West 97th Terrace
Overland Park, Kansas 66212
(913) 642-0422

ATTORNEY FOR APPELLEES

APPENDIX B

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PRELIMINARY STATEMENT

The defendants appeal from an adverse ruling by the Trial Court which denied defendants'Motion For Judgment Notwithstanding the Verdict, which was filed in response to jury verdicts that were given in favor of plaintiffs for punitive damages in varying amounts totalling $55,000 against all individual defendants as follows: $30,000 against defendant Jasper Mirabile, Jr.; $20,000 against defendant Leonard Mirabile; and, against defendant Sam Gianino, Jr. in the amount of $5,000. Judgment was rendered in favor of plaintiffs and against the defendants October 2, 1987.

The trial court by Memorandum and Order filed November 9, 1987 denied the defendants' post trial motion. Defendants' Notice of Appeal was filed in this court December 9, 1987.

This is a diversity case with the District Court's jurisdiction being predicated upon 28 U.S.C. Sect. 1332.

The jurisdiction of the United States Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. Sect. 1291 from the final decision of the United States District Court for the Western District of Missouri dated November 9, 1987.

STATEMENT OF ISSUES

1. Did the District Court err prejudicially to defendants in upholding jury verdicts for punitive damages against all individual defendants based upon "direct injury" torts(assault and false imprisonment) having been perpetrated against plaintiffs although no actual damage assessments were made in favor of any of the plaintiffs? Gloria vs. University of Health Sciences
713 S.W.2d 32 (Mo.App. 1986)
Herberholt vs. dePaul Community Health Center
625 S.W.2d 617 (Mo.banc 1981)
Jasperson vs. Purolator Courier Corp.
765 F.2d 736 (8th Cir. 1985)
Rusk Farms, Inc. vs. Ralston Purina Co.
689 S.W.2d 671 (Mo.App. 1985)

2. Were the jury verdicts which totalled in the aggregate $55,000 in punitive damages indicative of passion and prejudice against the defendants or reflective of a failure to follow the Trial Court's legal instructions?
American Business Interiors, Inc. vs. Haworth, Inc.
798 F.2d 1135 (8th Cir. 1986)
Kerr vs. First Commodity Corp. of Boston
735 F.2d 281 (8th Cir. 1984)
Vanskike vs. Union Pacific R. Co.
725 F.2d 1146 (8th Cir. 1984)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The incident giving rise to this lawsuit took place on July 10, 1986 in Kansas City, Jackson County, Missouri. Plaintiffs Hout and Norman were engaged in repairs of the water lines in the public street outside of Jasper's Restaurant in the vicinity of 75th Street and Wornall, Kansas City, Missouri. Defendant Jasper Mirabile, Jr. drove a vehicle out of the Jasper's parking lot and knocked over a safety barricade set up by plaintiffs to provide a safety barrier for the street work that was being done. Profanity was exchanged between plaintiff Hout and defendant Jasper Mirabile, Jr.

Defendant left the scene in the vehicle, and later returned and began another verbal exchange with Hout. Defendant then went into Jasper's Restaurant and came back out with others including Leonard Mirabile and Sam Gianino, Jr. The defendants Jasper Mirabile, Jr., Leonard Mirabile, and Sam Gianino, Jr. then attacked plaintiff Hout, and also attacked plaintiff Norman. Defendants kicked, hit, and repeatedly spat upon plaintiffs Hout and Norman who neither threatened nor mistreated defendants in any way whatsoever. Defendants threatened to kill the plaintiffs, and wielded dangerous instrumentalities such as a shovel, a two-foot long pipewrench, and a glass bottle. Defendants threw such items as a 5 gallon water cooler and metal traffic barricades at the plaintiffs. Defendants repeatedly used filthy, vile, and obscene language toward the plaintiffs. Attorney Larry E. Kinnamon Jr. interceded and was himself assaulted by the attorney for Jasper's Restaurant whose name is Salvatore Mirabile.

The Kansas City Missouri Police Department came to the scene and arrested all the plaintiffs, all the defendants and attorney Larry E. Kinnamon Jr. The City Prosecutor of Kansas City, Missouri decided to and did in fact dismiss all charges against everybody concerned prior to the Municipal Court Complaints being heard in the Municipal Division of the Circuit Court of Jackson County, Missouri

B. COURSE OF PROCEEDINGS

Plaintiffs adopt by reference the course of proceedings as stated in the brief of the Appellants.

C. STATEMENT OF THE FACTS

On July 10, 1986 the plaintiffs James Wright, Larry Hout, Sr., and David Norman were employed by Spinelli(sic)(the correct spelling of plaintiffs' employer is Spiniello Construction Co.) and were engaged in the relining and renovation of water mains along 75th Street near Jasper's Restaurant in Kansas City, Missouri.(Tr.pp. 833,834,835).

The water main work that was done for the City of Kansas City, Missouri at 75th Street and Wornall Road near Jasper's Restaurant took place over a two and one-half month period in the summer of 1986. (Tr. p. 267). On July 10, 1986, plaintiff Hout placed safety cones and barricades out in the street near 75th and Wornall prior to water main work being done on that date. (Tr. p. 268). Plaintiffs Larry Hout and David Norman were completing certain street work in connection with the water main repair on 75th Street next to Jasper's Restaurant on the date in question. (Tr. pp. 267,334,551). The necessary city permits had been obtained. (Tr. p. 550).

The safety cones and barricades were set out in the street by plaintiff Hout in a manner to promote safety. (Tr. pp.275,559). The cones and barricades did not block the driveway of Jasper's Restaurant. (Tr. pp.275,558). At approximately 1:15 pm on July 10, 1986 plaintiffs Hout and Norman had just finished putting a steel plate over the construction hole that was in the street near Jasper's Restaurant. (Tr. p. 276). Defendant Jasper Mirabile, Jr. drove out of the Jasper's parking lot and knocked over one of the safety barriers. (Tr. p. 282). Plaintiff Hout and defendant Jasper Mirabile Jr. exchanged profanity. (Tr. pp. 282,283). Defendant Jasper Mirabile Jr. drove away, but then, drove back into the Jasper's parking lot, left his vehicle and confronted plaintiff Hout. (Tr. p. 290).

Plaintiff Hout never got within ten feet of nor touched the vehicle that defendant Jasper Mirabile Jr. had been driving. (Tr. p. 28 Hout was attempting to finish picking up the barricades when defendant Jasper Mirabile, Jr. entered into a verbal exchange again with Hout. (Tr. p. 290). Defendant Jasper Mirabile Jr. beckoned Hout to come over to where defendant Jasper Mirabile Jr. was standing, and, then, the defendant went into Jasper's Restaurant and came back out with approximately six other men including defendants Leonard Mirabile and Sam Gianino, Jr. (Tr. p. 297,298,299). As the defendants came out of the restaurant toward plaintiff Hout, the defendants were yelling, screaming and cussing, including saying, "You are dead meat, you are a motherfucker, you are a son of a bitch, and we are going to kill you." (Tr. p. 299).

At the time of the latter exchange, Hout was empty-handed. (Tr. pp. 301, 302). He carried no tools or weapons of any kind. (Tr. pp. 301, 302). Hout did not threaten defendants or assault them in any way. (Tr. p. 561). Nor did Hout insult the defendants. (Tr. p.303)

Defendant Leonard Mirabile picked up a barrier and threw it across the street, and, then, kicked a traffic cone. (Tr. pp. 304,563). At this time, plaintiff David Norman came to where the difficulty was taking place. (Tr. p. 306). Defendants continued to use profanity against plaintiffs. (Tr. 307). As plaintiff David Norman approached, he was carrying no tools or dangerous instrumentalities. (Tr. p. 307). Defendant Sam Gianino, Jr. grabbed David Norman and held him in a bearhug, which Norman soon broke away from. (Tr. pp. 308,564,565). The other two defendants came toward plaintiff David Norman. (Tr. p.310) All David Norman said was, "What is going on?" (Tr. p. 311). David Norman did not do anything threatening toward the defendants. (Tr. p. 311). Plaintiff Hout told David Norman, "They are crazy. Let's get out of here and get back." (Tr. p. 312). At that time the defendants started kicking and shoving and pushing plaintiffs Larry Hout and David Norman and hitting them on the backs while the plaintiffs were walking around the truck trying to get away from the defendants. (Tr. pp. 312, 569,577). Also, the defendants were spitting on the plaintiffs during this time. (Tr.312, 569,579). Plaintiffs Hout and Norman felt very degraded. (Tr. pp. 313, 570). Defendants continued to pursue the plaintiffs kicking, hitting and cussing at the plaintiffs. (Tr. p. 314). Defendants called the plaintiffs "motherfuckers," and said that the plaintiffs' mothers were "cunts" AND THAT PLAINTIFFS' MOTHERS "sucked donkey dicks." (Tr. pp. 314,574). Defendants continued to yell and scream profanity. (Tr. p. 317). At that point, defendant Jasper Mirabile, Jr. grabbed a two-foot long pipewrench and waved it over his head while acting very angry. (Tr. pp. 320, 580, 581).

Defendant Leonard Mirabile held a shovel and beat it on the back of the forklift where plaintiff David Norman was seated trying to stay away from the defendants. (Tr. pp. 321, 322,572). David Norman was threatened with the shovel. (Tr. pp. 575, 576). One of the defendants threw a 5 gallon water cooler at plaintiff David Norman. (Tr. pp. 322, 323, 577, 578). One of the defendants grabbed a glass bottle and threatened to cut up plaintiff Norman. (Tr. pp. 575, 576). Norman thought defendants were going to kill him. (Tr. p. 575). The defendants also threw metal traffic barricades and cones at David Norman. (Tr. p. 579).

Attorney Larry E. Kinnamon Jr. happened to be in the area, and Kinnamon walked between the plaintiffs and defendants and asked everyone to calm down. Defendants asked who in the fuck Kinnamon was. (Tr. p. 324). Kinnamon said nothing threatening. (Tr. p. 324). Kinnamon said, "I am a law abiding citizen and I am here to try to help calm things until the police get here." (Tr. p. 325). Kinnamon advised that he was an attorney at which time defendants next comment was, "Get the fuck out of here. It is none of your business." (Tr. p. 325). Kinnamon did not say anything threatening or obscene and did not take any threatening action toward anybody. (Tr. pp. 325, 583, 585). Defendants told Kinnamon as follows: "Your mom is a cunt and your mom sucks donkey dicks this long," they also called attorney Kinnamon a "cocksucker and son of a bitch" and said "fuck you." (Tr. p. 326). Attorney Kinnamon again said to settle down, the police are on their way. (Tr. p. 326).

At that time plaintiff James Wright showed up in a truck to find out what was going on. There were additional workers in the

company truck with plaintiff James Wright, and none of the workers from the Spiniello Construction Company truck did anything assaultive or offensive to the defendants, nor did the Spiniello workers make any rude or obscene remarks to anybody. (Tr. pp. 328, 329).

Salvatore Mirabile showed up on the scene, and said he was an attorney representing the restaurant. (Tr. p. 329). Salvatore Mirabile asked Larry Kinnamon what he was doing. Kinnamon said he was going to stay until the police arrived and he was trying to keep things calm and keep them apart. (Tr. p. 330). Salvatore Mirabile told attorney Kinnamon that it was none of his business. He saw that Kinnamon wasn't going to leave the scene so Salvatore Mirabile started threatening him with a pipe wrench. He said, "I ought to stick this up your ass." (Tr. p. 330). Salvatore was using profanity. Salvatore Mirabile spit on attorney Kinnamon and then struck him "square in the nose" causing blood to be splattered on James Wright and on the yellow shirt of Kinnamon. (Tr. p. 331). The policemen then arrived. The plaintiffs pressed charges against the defendants, then, the defendants decided to press charges against all the plaintiffs. Accordingly, all the plaintiffs and defendants were arrested, placed in police department paddy wagons, and transported to the city jail. (Tr. pp. 452,454-56,638). The city prosecutor for some unknown reason,unilaterally decided to dismiss all charges prior to any of the Municipal Court Complaints being brought before the court. (Tr. pp. 384,624,881).

The plaintiffs were kept in a paddy wagon for 15 to 20 minutes without the vehicle moving with the interior temperature at 120 degrees Fahrenheit. (Tr. p. 856). Plaintiffs were kept in the police department paddy wagon an additional 30 minutes while being transported to the

downtown Kansas City, Missouri police headquarters. (Tr. p. 856). Plaintiffs were put behind bars where criminals are kept. Plaintiffs were fingerprinted and searched and frisked like criminals. (Tr. p. 856) Plaintiffs were kept in the holding cell for three to three and one-half hours. (Tr. p. 857). The deprivation of plaintiffs' freedom was degrading, and caused plaintiffs to feel disgraced. (Tr. pp. 596, 598, 858).

SUMMARY OF THE ARGUMENT

Voluminous evidence supports the jury's verdicts in favor of all plaintiffs for direct injury intentional tort claims of assault and one verdict for false imprisonment. Substantial punitive damage awards were given for each plaintiff founded upon intentional wrongful assaultive conduct demonstrated by each of the defendants. That no actual damages were awarded to the plaintiffs reflects only the difficulty the jury had with trying to evaluate intangible losses such as fright, degradation, and disgrace.

It is apparent that the jury concluded from all the evidence, that each of the individual defendants acted with "malice" and was guilty of intentional wrongful conduct toward the plaintiffs without just cause or excuse. Punitive damages,the purpose of which is to punish misbehaving defendants, were properly assessed for the just purpose of deterring defendants and other miscreants from the type of abominable behavior that was brought out in this case at trial.

Mere nominal damages will support punitive damages in Missouri. Moreover, when a person's rights are violated in this state, even where no actual damages exist, the law presumes damages,and it is appropriate to allow $1.00 nominal damage as a matter of law. Rusk Farms, Inc., supra. Furthermore, where defendants have acted with "malice", even where actual damages are not supported by the evidence, it is proper for the Appellate Court in Missouri to amend the jury's verdicts and assess nominal damages of $1.00 as a procedural formality. Herberholt, supra.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS; IT WAS APPROPRIATE FOR THE JURY TO ASSESS VARIOUS AMOUNTS OF PUNITIVE DAMAGES AGAINST THE THREE INDIVIDUAL DEFENDANTS AGGREGATING FIFTY-FIVE THOUSAND DOLLARS ($55,000) IN THESE "DIRECT INJURY" INTENTIONAL TORT CLAIMS WITHOUT A CONCOMITANT FINDING OF ACTUAL DAMAGES; THIS COURT SHOULD, AS A PROCEDURAL FORMALITY, AMEND THE VERDICTS TO ALLOW $1.00 NOMINAL DAMAGE ON EACH VERDICT IN FAVOR OF PLAINTIFFS.

THE AWARDS OF PUNITIVE DAMAGES WITHOUT FINDINGS OF ACTUAL DAMAGES ARE PROPER

1. The Jury has awarded total punitive damages against defendants in varying amounts totaling $55,000, without awarding actual damages to any of the three plaintiffs. The jury was instructed on two intentional tort theories of recovery; (1) Assault; and (2) False Imprisonment. None of the properly crafted Verdict Directing Instructions required an element of actual damages as a predicate to a return of punitive damage verdicts in favor of plaintiffs.

2. The appellants repeat several times in their brief a fundamental misstatement relating to the District Court's Instruction No. 26 which relates to damages. At pp. ii, 6, 7, and 10 of Appellan Brief appears the faulty contention as follows: "The Court instructe the jury that punitive damages could be awarded only if actual damages were first found." This distortion arises from Instruction No. 26 which appears verbatim at p. 8 of Appellants' Brief (and as Addendum A-6). Instruction No. 26 was correct. It instructed the

jury that "in addition to any damages to which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount as punitive damages against such defendant in such sum as you believe will serve to punish such defendant and to deter him and others from like conduct." This instruction means just what it says. The jury can assess actual damages. The jury can also assess punitive damages. The instruction does not make actual damages a condition precedent to the proper assessment of punitive damages. Evidently the appellants misunderstood the instruction.

3. Instruction No. 26 read in conjunction with Instruction No. 24, and when considered in light of the intangible damages such as humiliation and embarrassment suffered by the plaintiffs probably explains why the jury assessed no actual damages for the plaintiffs. Intangible suffering founded upon grief, humiliation, disgrace, and embarrassment are extremely difficult for a jury to evaluate from a monetary standpoint. The Court in Instruction No. 24 warned the jury not to award "speculative damages." The Trial Court noted succinctly at page 2 of the Memorandum and Order of November 9, 1987:

> "The absence of 'actual damage' recoveries does not signify that no physical or mental harm was done, but simply the apparent difficulty of putting a dollar value on the harm to plaintiffs."

4. The appellants' in their post-trial Motion For Judgment Notwithstanding The Verdict, and in the Appeal to this court rely primarily upon the case of Melville vs. Cheryl Scott Real Estate

Company 664 S.W.2d 529(Mo.App. 1983). The latter case as noted by the District Court in the instant case is distinguishable based upon the types of torts involved in the two cases. The Trial Court cogently explained the difference between the nature of the tort involved in Melville, supra. as compared with the claims in the present case. At p. 3 of the November 9, 1987 Memorandum and Order the District Court stated:

> "The Melville case can easily be read as a procedural miscarriage in which plaintiff lost a $10,000 judgment because the jury neglected to award $1.00 nominal damages. The case is more sensibly explained, however, by a decision cited therein(Stevenson v. Stevenson 618 S.W.2d 715,719 (Mo.App. 1981)) in which an old rule was followed that 'deceit belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action.' This is 'in contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damages.' Thus, in Melville as in Stevenson no punitive damages were allowable because plaintiff had simply lost the case when there was a failure to establish pecuniary loss. In the present case, however, we are surely dealing with 'direct injury' torts like trespass, where the wrong is committed regardless of pecuniary loss." (Emphasis added.)

5. The subtle distinction noted by the District Court is quite precise and correct analytically. The intentional tort of assault

in the words of Professor William L. Prosser "developed very early as a form of trespass(cites Smith vs. Newsom 3 KEB. 283, 34 Eng. Rep. 722(1674)). This action is the first recognition of a mental as distinct from a physical injury. There is 'a touching of the mind, if not of the body.' (cites Kline vs. Kline 64 N.E. 9 (Ind. 1902)). The explanation of its early appearance lies in the obvious likelihood that assaults will result in breaches of the peace, against which the action of trespass was created to enforce the criminal law.(cites Carpenter, Intentional Invasion of Interest of Personality, 13 Or. L. Rev. 227,237(1934); Restatement of Torts, Sec. 24, Comment c.)

The interest in freedom from apprehension of a harmful or offensive contact with the person, as distinguished from the contact itself, is protected by an action for the tort known as assault. No actual contact is necessary to it, and the plaintiff is protected against a purely mental disturbance of his personal integrity." See, Prosser, TORTS, Fourth Edition, West Publishing Co.(1971) pp. 37,38.

6. Professor Prosser elucidates on the damage components for the intentional tort of assault at page 38:

> "Since assault, as distinguished from battery, is essentially a mental rather than a physical invasion, it follows that the damages recoverable for it are those for the plaintiff's mental disturbance including fright, humiliation...as well as any physical illness which may result from them. The establishment of the technical cause of action, even without

proof of any harm, entitles the plaintiff to vindication of his legal right by an award of nominal damages. (emphasis added) (cites Walker vs. L. B. Price Mercantile Co. 166 S.E. 391(1932). Like battery, assault frequently arises out of the worst intentions, and therefore is an appropriate tort for punitive damages (emphasis supplied), (cites Trogden vs. Terry 90 S.E. 583(N.C. 1916)) except in those cases where it is committed because of an innocent mistake."

7. No doubt Professor Prosser would agree with the jury's evaluation that defendants' spitting on the plaintiffs, waving of a shovel, wielding a two-foot long pipewrench, chasing, etc. constituted intentional tortious assaultive conduct. Prosser explains that: "Any act of such a nature as to excite an apprehension of a battery may constitute an assault. It is an assault to shake a fist under another's nose,(cites United States vs. Myers 1 CRANCH C. C. 310(D.C. 1806); to aim or strike at him with a weapon,(cites Hol v.Holdorf 169 N.W. 737(1918)(involving threatening gesture with a club); or to hold it in a threatening position(cites United States vs. Richardson 5 CRANCH C.C. 348 (D.C. 1837); to rise or advance to strike another (cites Hrnicek vs. Chicago, M. & St. P.R. Co. 175 N.W. 30 (1919)(advancing on plaintiff with poker and threats); or to chase him in a hostile manner(cites Mortin vs. Shoppee 172 Eng. Rep. 462(1823)."

8. The evidence adduced at trial by plaintiffs was simply overwhelming that defendants were vicious, wanton, unseemly assaulter of plaintiffs Hout and Norman on the infamous day of July 10, 1986.

The jury's findings were well warranted that defendants perpetrated malicious wrongful acts without just cause or excuse, thus, justifying the imposition of substantial punitive damages against the individual defendants.

9. It must be emphasized that none of the Verdict Directing Instructions such as numbers 29,31,33,35,37,39,41,43,45,47,49,51, or 53 contained an element requiring the jury to make a finding of actual damages as a part of any of the assault or false imprisonment claims of plaintiffs. The verdicts reached by the jury were appropriate for the proper instructions given by the court. The appellants concede that nominal damages are an adequate predicate to a valid assessment of punitive damages in Missouri. Certainly Missouri case law supports that concession. See Gloria vs. University of of Health Sciences 713 S.W. 2d 32 (Mo.App. 1986); Herberholt vs. dePaul Community Health Center 625 S.W.2d 617,624(Mo.banc 1981).

10. Appellants believe an additional $7.00 in nominal damages (i.e. $1.00 for each of the 7 verdicts in favor of plaintiffs) must be assessed for the punitive damages awarded to plaintiffs to be proper and correct. This court should grant appellants' wish, and, as a procedural nicety, amend the 7 verdicts for plaintiffs with $1.0 each nominal damage. Such action is appropriate inasmuch as in Misso there is an "implication of damages,(i.e. nominal damages),whenever a right is violated such as occurred to plaintiffs in the instant cas See Rusk Farms, Inc. vs. Ralston Purina Co. 689 S.W.2d 671,681(Mo.App 1985). Appellants emphasize that no nominal damage instruction was requested by plaintiffs' legal counsel nor given by the trial court. Certainly no prejudice could have resulted to defendants by such inaction. Plaintiffs' legal counsel anticipated a meaningful actual

damage recovery for each plaintiff, and, furthermore, concluded that a nominal damage instruction might be tactically disadvantageou Plaintiffs' counsel was amazed that no actual damages were awarded. A request could have been made of the District Court to add $1.00 nominal damage to each verdict in favor of plaintiffs. Such de minimus deficiency could not have prejudiced the defendants since they were saved $7.00 thereby. Nor should such slight procedural deficit be a basis to take away well-considered punitive damage awards against these vicious, assaultive, intentional tortfeasor defendants.

11. On appeal, the court must view the evidence in the light most favorable to the verdict. See Briner vs. Sachs Electric Co. 680 S.W.2d 737 (Mo.App. 1984). The Appeals Court accepts plaintiffs evidence as true, together with all reasonable inferences arising therefrom. Moreover, defendants' evidence is disregarded, except insofar as it may aid plaintiffs' case. See Yoos vs. Jewish Hospital of St. Louis 645 S.W.2d 177, 183 (Mo.App. 1982). It is clear from the jury's verdicts that factual findings of multiple legal assaults and one false imprisonment against the defendants were made. The jury concluded that actual damages should not be awarded. Neverthel the jury rightly concluded that the individual defendants acted with "legal malice" toward the plaintiffs, thus, justifying the impositio of substantial punitive damages. The jury was well instructed that they could conclude that defendants acted with legal malice if it was established that defendants acted wrongfully and intentionally without just cause or excuse.

12. The record is replete with eye witness testimony of the defendants' willful, wanton, mean-spirited, malicious, assaultive misconduct. Even though the plaintiffs suffered no bodily injuries, incurred no medical bills, and experienced no loss of earnings from the defendants' tortious misconduct, still, there was substantial evidence that plaintiffs suffered intangible losses such as fright, embarrassment and humiliation, which, from an evidentiary standpoint, would have provided adequate evidentiary support for an award of actual damages. See Mitchell vs. Pla-Mor, Inc. 237 S.W.2d 189,191 (Mo.1951); Seested vs. Post Printing & Publishing Co.31 S.W.2d 1045 (Mo. 1930).

13. That the jury awarded no actual damages in the case is inconsequential, as noted astutely by the District Court in the Memorandum and Order filed November 9, 1987, at page 2:

> "The absence of 'actual damage' recoveries does not signify that no physical or mental harm was done, but simply the apparent difficulty of putting a dollar value on the harm to plaintiffs. The verdict forms contain a finding filled out by the jury in favor of each plaintiff against the defendant in question for either assault or false imprisonment, and then contain the figure '0' as the amount of actual damages and the pertinent figures mentioned as punitive damages. Neither party requested and the court did not give an instruction on nominal damages, as might have been desirable."

There are many types of wrongful conduct which cause no actual injury or damage but which legally constitute intentional tortious conduct

which, when perpetrated by defendants intentionally, without just cause or excuse, justify the imposition of punitive damages. In the instant case, the record is seething with evidence of such egregious misconduct as spitting, hitting, kicking, threatening with lethal tools (two-foot long pipewrench, shovel). All such behavior by defendants constitutes assault, and the jury was properly instructed accordingly.

14. Under Missouri law, the test to be applied in determining the presence of legal malice sufficient to support an award of punitive damages is whether defendants did a wrongful act intentionally, and without just cause or excuse. Evidence that supports elements of an intentional tort may also support the legal malice required for punitive damages. See Crues vs. KFC Corporation 729 F.2d 1145, appeal after remand 768 F.2d 230, (C.A.Mo. 1984). It is the defendant actor's intentional doing of a wrongful act without just cause or excuse that warrants the imposition of punitive damages. Lewis vs. Barnett 694 S.W.2d 743 (Mo.App.1985). Legal malice is the pivotal issue in assessing the propriety of an award of punitive damages. Gaffney vs. Community Federal Savings and Loan Assn. 706 S.W.2d 530 (Mo.App. 1986).

15. The jury was also properly instructed that if defendants instigated the restraint of plaintiffs against their will without reasonable cause, then, a finding in favor of plaintiffs for false imprisonment could be given. The jury found for plaintiff James Wright against defendant Jasper Mirabile, Jr. predicated upon false imprisonment. Conceptually the jury obviously opined that Jasper

Mirabile, Jr. had no reasonable basis in fact to instigate the restraint of plaintiff James Wright by causing him to be falsely arrested, placed in a paddy wagon, held in a police department holding cell (jail), and thereby causing plaintiff to be deprived of his freedom in a significant way. The jury found that James Wright was not injured or damaged but that defendant, in instigating the false imprisonment, acted with legal malice (i.e. perpetrated a wrongful act intentionally, and without just cause or excuse). Accordingly, the assessment of punitive damages by the jury accomplis the salutary purpose of punishing defendant and deterring defendant and others like the defendant from committing such bad acts in the future.

16. It is apparent that the jury concluded in each of the seven verdicts in favor of the plaintiffs that while no injuries were sustained which were calculatable in terms of compensatory damages, still, defendants were each found to have engaged in wrongfu conduct of an assaultive nature intentionally, and without just cause or excuse. Defendants' gross misconduct warranted punishment. On this fundamental factual point there can be absolutely no philosophic dispute. Thus, rightfully, punitive damages were assessed against each of the individual defendants. The jury concluded from the overwhelming evidence adduced of defendants "outrageous" assaultive misconduct which included death threats T. 84,92, wielding a two-foot long pipewrench in a menacing manner T. 88,89, waving a shovel in a threatening way T. 85,87, and, last, but not least, spitting on the plaintiffs repeatedly T. 85,84, that defendants had assaulted

plaintiffs (i.e. David Norman and Larry Hout), and, further, that the egregious misconduct of defendants amounted to the doing of intentional wrongful acts against plaintiffs without just cause or excuse. The imposition of meaningful punitive damages was warranted by the evidence. The giving or withholding of punitive damages, as well as the amount thereof, lies wholly within the discretion of the jury. Mitchell vs. Pla-Mor, Inc, supra. ; Peak vs. W.T.Grant 386 S.W.2d 685 (Mo.App.1964); Grier vs. Kansas City C. C. and St. J. Ry. Co. 228 S.W. 454 (Mo.banc 1921); Seested vs. Post Printing and Publishing Co., supra. "Unless, therefore, it plainly appears that there has been an abuse of such discretion, a court is not justified in interfering with an assessment of punitive damages." Mitchell vs. Pla-Mor, Inc, supra.

17. It is settled law that mere nominal damages (i.e. $1.00) will support an award of punitive damages. See Gloria vs. University of Health Sciences, supra ; Herberholt vs. dePaul Community Health Center, supra.; State ex rel. St. Joseph Belt Ry. Co. vs. Shain 108 S.W.2d 351 (Mo.1937). In Herberholt the Missouri Supreme Court en banc determined that even though the evidence in the lawsuit could not support an award of actual damages, still the court assumed inherent authority to modify the verdict after appeal to reflect the court imposition of $1.00 nominal damage. Significantly, the court permitted the jury's assessment of $50,000 in punitive damages to stand. Again, there is a "legal implication of damages" whenever plaintiffs' rights are violated. Rusk Farms, Inc. vs. Ralston Purina Co., supra.

18. Where the evidence does not support an award of actual damages, this court too presumes the inherent authority to modify the jury's verdict to allow $1.00 nominal damage. See Jasperson vs. Purolator Courier Corp. 765 F.2d 736 (8th Circ. 1985). Where a plaintiff's right has been violated in Missouri, there is a corresponding right to damages. Missouri cases on the subject say that where an actionable wrong is done, even where no actual damages appear on inquiry, nevertheless, judicially, there is an "implication of damages" and nominal damages are given. Rusk Farms, Inc. supra.; Wente vs. Shaver 169 S.W.2d 947,954 (Mo. 1943).

19. The concept of nominal damages is a judicially created fiction that is sedulously adhered to in Missouri courts. Whether this fiction is followed and $1.00 is placed on the verdict form as a procedural formality, or the jury awards zero in the space for actual damages on the applicable Verdict Form, in either event, the reality is that actual damages are non-existent. In such cases, there is no rational nexus between an award of actual damages, and an award of punitive damages. Under Missouri law, there must be a nexus between the wrong committed by defendant and the amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. See Kerr vs. First Commodity Corp. of Boston 735 F.2d 281 (8th Circ. 1984). Hence, the amount of actual damages awarded (even if none whatsoever) does not correlate with the propriety of a jury's allocation of punitive damages. The pivotal issue is simply whether the defendant did a wrongful act to another intentionally without just cause or excuse. If the finder of fact determines the answer to the latter inquiry to be in the affirmative, then, a punitive

damage assessment is necessary and proper in the case. Nika Corp. vs. City of Kansas City, Mo. 582 F.Supp. 343 (D.C.Mo. 1983).

20. The basis for actual and punitive damages are entirely different at law. Because the purpose of these damages are totally unrelated, there is simply no logical reason to require any actual damages to be assessed as a condition precedent to a valid allocation of punitive damages. Missouri Supreme Court Rule 71.06 requires only that actual and punitive damages be separately stated. That Rule provides inter alia, "When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict." Such was properly done in the instant case. Actual damages are to compensate a victim, whereas, punitive damages are awarded only in order to inflict punishment for wrong doing and to serve as an example and deterrent to similar conduct in the future. See Honeywell vs. Village of Lakeside 604 F.Supp. 932 (D.C.Mo. 1985). Accordingly, the amount of actual damages, even if none whatsoever, is not relevant to the issue of the appropriateness of a punitive damage assessment. As a procedural nicety, the District Court could have entered judgments for nominal damages of $1.00 on each Verdict Form. (See p.4 Memorandum and Order of November 9, 1987). Failure of the District Court to make such judgment entries was at most a procedural flaw that inured to the benefit of all defendants. Such a procedural deficit was not prejudicial to any of the defendants. As wisely noted by the District Court at p.5 of the Memorandum and Order of November 9, 1987:

> "I cannot believe that any such a procedural defect, which saved defendants a total of $7, is a matter that

is incurable, prejudicial to defendants, or would offer grounds for causing plaintiffs to lose a judgment of $55,000."

21. Most of the verdicts in the instant case in favor of plaintiffs were on the assault Counts. It is apparent from an evaluation of the Verdict Forms that the jury rightly concluded that multiple technical legal assaults were perpetrated by the defendants without definitive injuries being sustained that were susceptible to compensatory damage calculations as to the plaintiffs. Hence, the jurors awarded no actual damages. However, the jurors found that the assaultive conduct exemplified by the defendants, and well supported by eye witness testimony, reflected legal malice, and that defendants conducted themselves wrongfully and intentionally in an assaultive manner without just cause or excuse. Necessary punishment was meted out to the defendants in the jury's wise imposition of punitive damages.

B. THE ASSESSMENT OF VARYING SUMS OF PUNITIVE DAMAGES ON SEVEN VERDICT FORMS AGAINST THE THREE INDIVIDUAL TORTFEASOR DEFENDANTS HEREIN FOR AN AGGREGATE PUNITIVE DAMAGE AWARD OF $55,000 WAS NOT EXCESSIVE NOR INDICATIVE OF PASSION OR PREJUDICE ON THE PART OF THE JURY.

1. The jury was appropriately instructed that punitive damages could be imposed if it was determined that defendants acted with "malice", i.e., that defendants intentionally did wrongful acts without just cause or excuse. See Crues vs. KFC Corp, supra. Legal malice will suffice so as to warrant punitive damages. See Raasch vs. Tri-County Trust Co. 712 S.W.2d 5 (Mo.App. 1986).

2. Generally, the assessment of damages is within the sound discretion of the jury. Vanskike vs. Union Pacific R. Co. 725 F.2d 1146 (C.A. Mo. 1984). Substantial punitive damage awards have been upheld by this court even where only nominal damages are proper, and when no physical injuries were suffered by the plaintiff. See, American Business Interiors, Inc. vs. Haworth, Inc. 798 F.2d 1135 (8th Cir. 1986), which upheld a punitive damage award of $250,000 as not excessive when only $1.00 nominal damage was applicable.

CONCLUSION

This Court should affirm the trial Court's denial of defendants' Motion for Judgment Notwithstanding the Verdict; moreover, while the jury's verdicts awarding punitive damages aggregating $55,000 on seven Verdict Forms for plaintiffs were proper, this Court should exercise its inherent judicial authority to amend each of the seven jury verdicts so as to allow $1.00 nominal damage on each verdict consistent with Jasperson vs. Purolator Courier Corp., supra.; Herberholt vs. dePaul Community Health Center, supra.; and, Rusk Farms, Inc. vs. Ralston Purina Co., supra. The judgments for plaintiffs as amended should be affirmed by this court.

Respectfully submitted,

Larry E. Kinnamon Jr.
Missouri Bar Number 26337
6929 West 97th Terrace
Overland Park, Kansas 66212
(913) 642-0422

ATTORNEY FOR APPELLEES